In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 637

TOWN OF HEMPSTEAD, ET AL., PETITIONERS

v.

AMERICAN AIRLINES, INC., ET AL. AND THE ADMINISTRATOR OF THE FEDERAL AVIATION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT ADMINISTRATOR OF THE FEDERAL AVIATION AGENCY IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 16a–34a) is reported at 272 F. Supp. 226. The opinion of the court of appeals (Pet. App. 1a–15a) is reported at 398 F. 2d 369.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1968. The petition for a writ of certiorari was filed on October 11, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

325-207—68

QUESTION PRESENTED

Whether the courts below correctly held that an ordinance purporting to regulate noise, enacted by a town located adjacent to Kennedy International Airport, in fact regulated the use of navigable airspace by airplanes in a manner conflicting with federal law.

STATUTES INVOLVED

The relevant provisions of the Federal Aviation Act of 1958 are set forth in the appendix to the petition for a writ of certiorari (Pet. App. 35a–41a).

STATEMENT

Petitioner Town of Hempstead, a town situated adjacent to Kennedy International Airport in New York, enacted an "unnecessary noise ordinance" making unlawful the creation of any noise within the town that exceeds certain specified noise levels. The ordinance is expressly made applicable to noise created by aircraft.

Respondents—nine airline carriers, the Air Line Pilots Association and the Port of New York Authority (the operator of Kennedy Airport), subsequently joined by the Administrator of the Federal Aviation Agency—brought suit in the United States District Court for the Eastern District of New York against the petitioners, the Town of Hempstead and certain town officials, seeking, *inter alia,* a preliminary injunction restraining the enforcement of the ordinance in so far as it applied to airplanes flying over the town. Petitioners cross-moved for a preliminary injunction restraining violations of the ordi-

nance, arguing that the ordinance was a valid exercise of the town's police powers to prevent loud noises caused by those airplanes.[1]

After extensive hearings on the motions, the district court entered detailed findings of fact and concluded that there existed a substantial doubt of the validity of the ordinance because, on the record thus far made, it had been shown that the ordinance (1) necessarily regulated air traffic in interstate and foreign commerce, a subject reserved by the Constitution exclusively to the national government; (2) unduly burdened such commerce; (3) necessarily regulated a subject matter preempted by federal legislation; and (4) directly conflicted with applicable and valid federal regulation (App. 263a–264a).[2] In elaboration of the last point, it found that the federal government, acting through the Administrator of the Federal Aviation Agency and pursuant to his authority under the Federal Aviation Act of 1958, 49 U.S.C. §§ 1301–1542, had established a comprehensive scheme regulating the use of navigable airspace in and around Kennedy Airport; that the effect of the town's ordinance would be to prohibit airplanes from flying over the town at certain altitudes; and that it thereby restricted the landing and take-off patterns and procedures prescribed by the Administrator and normally followed by airplanes using the airport (Findings of

[1] The town has never contended that such noises constituted a "taking" of property. See *United States* v. *Causby*, 328 U.S. 256; *Griggs* v. *Allegheny County*, 369 U.S. 84.

[2] "App." references are to the Appendix to appellants' brief in the court of appeals.

Fact Nos. 191, 200, 238, 254, 282–289; App. 242a, 245a, 251a, 255a, 260a–262a).

On an interlocutory appeal, the district court's findings of fact were not challenged; the court of appeals affirmed the judgment solely on the fourth ground—that the ordinance was in conflict with the federal regulatory scheme—without passing on the other three (Pet. App. 6a). The court of appeals noted:

> The ordinance and these regulations [of the Administrator of the Federal Aviation Agency] are unquestionably in direct conflict. They are in conflict not because the regulations and the ordinance impose different standards for noise, but because the district court has found * * * that compliance with the noise ordinance would require alterations in the flight patterns and procedures established by federal regulation [Pet. App. 8a–11a].

ARGUMENT

1. In the court of appeals, petitioner did not attack the "crucial findings"[3] of the district court that the town's ordinance, although purporting merely to regulate unnecessary noise, has the effect of regulating the use of navigable airspace in a manner that directly conflicts with valid federal law regulating the use of such airspace. In such circumstances the federal law prevails over the local ordinance; and the preliminary injunction restraining the enforcement of the ordinance against airplanes flying over the town was plainly proper.

[3] Pet. App. 3a–6a.

2. Because the ordinance was found to conflict chiefly with directives and regulations issued by the Administrator of the Federal Aviation Agency to regulate procedures at one airport, petitioners contend that the local law need not yield to federal law (Pet. 4–5; see Findings of Fact Nos. 67–104, App. 216a–224a). This Court has made clear, however, that when the federal government undertakes to regulate a particular segment of interstate commerce, local law inconsistent with this federal regulation must yield even though the federal regulation is carried out through administrative action. See, *e.g.*, *Cloverleaf Co.* v. *Patterson*, 315 U.S. 148; *Pennsylvania R. Co.* v. *Illinois Brick Co.*, 297 U.S. 447; *Florida Lime and Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142–143. See also *Campbell* v. *Hussey*, 368 U.S. 297; *Northern Natural Gas Co.* v. *State Corporation Commission of Kansas*, 372 U.S. 84.

3. Petitioners contend that the court of appeals erred in refusing to consider their plan for regulating the use of navigable airspace in a manner they claimed would be consistent with both federal and town goals (Pet. 4–5). The district court had found that any alteration to comply with the ordinance would result in either a substantial sacrifice in flight safety or a decrease in the traffic handling capacity of Kennedy Airport (Findings of Fact, Nos. 281–294, Pet. App. 3a n. 1), and would impose the same problem Hempstead now suffers on other communities (Pet. App. 33a, 14a). Even if accommodation on the part of the federal government could avoid direct collision, it would not be required; it is the local

regulations, and not the federal, that must yield. *Northern Natural Gas Co.* v. *State Corporation Commission of Kansas, supra,* 372 U.S. at pp. 92–93.

4. The decision below is in accord with settled judicial authority. Attempts by local governments to control the use of navigable airspace by airplanes in a manner inconsistent with federal regulation have been uniformly rejected by the lower courts. See, *e.g., Allegheny Airlines* v. *Village of Cedarhurst,* 238 F. 2d 812 (C.A. 2); *City of Newark* v. *Eastern Airlines,* 159 F. Supp. 750 (D.N.J.); *American Airlines, Inc.* v. *City of Audubon Park,* W.D. Ky., Civ. No. 5828, April 1, 1968, appeal filed, No. 18,675, C.A. 6, April 19, 1968.

Petitioners correctly note that the district court ruled, as one of its alternative holdings, that the entire area of regulation of air commerce was pre-empted by federal legislation and state that this alternative holding is in conflict with the decision of a state court (Pet. 6). *Loma Portal Civic Club* v. *American Airlines, Inc.* 39 Cal. Rptr. 708, 394 P.2d 548. However, the state court's discussion (39 Cal. Rptr. at 714, 394 P.2d at 554) was only dictum, and in any event the court of appeals expressly refrained from passing upon the issue of pre-emption, which was unnecessary to its decision.[4]

[4] Legislation having a direct bearing upon the issue of pre-emption in the area of airplane noise control was enacted by Congress subsequent to the decisions of the courts below. See 82 Stat. 395, Pub. L. 90–411 (July 21, 1968). This legislation, among other things, requires the Administrator of the Federal Aviation Agency to prescribe rules and regulations for the control and abatement of aircraft noise.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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